No. 2500

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

POWER AND IRRIGATION COMPANY OF CLEAR LAKE (a corporation),

Appellant,

vs.

CAPAY DITCH COMPANY (a corporation), YOLO COUNTY CONSOLIDATED WATER COMPANY (a corporation), J. M. ADAMSON, L. D. STEPHENS and JOSEPH CRAIG,

Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

Statement of Facts.

No more able summary of the facts of this case can be obtained than that contained in the opinion of the Judge of the District Court, rendered at the time of the order dismissing the bill.

The facts, as there stated, are as follows:

> "The complaint avers that the Central Counties Land Company, a corporation, organized under the laws of the State of California, was on November 18th, 1907, the owner of certain lands in Lake County, and on that day bor-

rowed from defendant Capay Ditch Company three several sums of money, $5,625.00, $8,320.75 and $10,625.00, and executed and delivered to said ditch company its three several promissory notes for the said amounts all payable on or before August 1st, 1908. That contemporaneously, and as a part of the same transaction, and solely for the purpose of securing the payment of said notes, the said Central Counties Land Company executed and delivered to said ditch company an instrument in writing, in form a grant, bargain and sale deed, but intended as a mortgage, conveying to said ditch company the said lands in Lake County; that on December 18th, 1911, the said ditch company conveyed said lands to defendant Yolo County Consolidated Water Company, which company thereafter conveyed the said lands to defendants, L. D. Stephens and Joseph Craig, who in turn conveyed the same to defendant Yolo Water and Power Company, and that each and all of the defendants named took said conveyances with full knowledge of the real nature of the original deed from the Central Counties Land Company to the Capay Ditch Company; that plaintiff is the successor in interest of said Central Counties Land Company, and all of the title of said lands, has, by mesne conveyances, become and is now vested in plaintiff, and that all of the demands of said Central Counties Land Company against the defendants have been transferred to plaintiff.

"This action seeks to have the deed to the Capay Ditch Company adjudicated a mortgage, and that leave be granted plaintiff to redeem said land by paying whatever is found to be due such defendants as may be entitled to it. Possession of the land is also sought, as well as an accounting of the rents, issues, and profits thereof. It is further asked that a receiver be appointed to take charge of said lands and pre-

> serve the same, and that defendant Yolo Water & Power Company be enjoined from doing certain contemplated work thereon. A number of other averments of the complaint are omitted from this statement, because they have no bearing upon the question to be determined at this time."

The situation presented in 1913 was briefly this: The Central Counties Land Company, a *California corporation,* hereinafter referred to as the Land Company, had borrowed certain money from the Capay Ditch Company, a *California corporation,* hereinafter referred to as the Ditch Company, and for the purpose of securing the payment of this loan, had mortgaged to the Ditch Company certain land belonging to the Land Company. The Power and Irrigation Company of Clear Lake, appellant herein, was organized as an *Arizona corporation,* April 9, 1913. The Land Company *assigned its equity of redemption* to the appellant, plaintiff below, and on April 25, 1913, said plaintiff instituted this action whereby it seeks to have the deed to the Ditch Company adjudged a mortgage and that it be granted leave to redeem said land on repayment of the loan.

It will be noticed that the lower Court also states, in its summary above referred to, that "a number of other averments of the complaint are omitted from this statement, because they have no bearing upon the question to be determined at this time". Referring to page 3 of appellant's brief, under the caption "Allegations apparently

overlooked by the Court below" we find these "other averments" are as follows: That the plaintiff is the owner, in addition to the mortgaged property, of certain other land on Clear Lake and that the defendant Yolo Power and Water Company, an alleged grantee of the mortgaged premises with notice of the mortgage, threatens to erect a dam on said premises, thereby causing said premises and the other land belonging to the plaintiff to be flooded. Accordingly plaintiff seeks an injunction restraining the defendant Yolo Power and Water Company from the erection of said dam.

In passing on the question of the Court's jurisdiction to entertain this bill to redeem, the lower Court very properly ignored this part of the bill. The question presented was—has this plaintiff the right to maintain this action to redeem in the Federal Courts, when the Land Company, its assignor, could not so maintain it. The fact that as *ancillary and subordinate to* this bill to redeem, the plaintiff also seeks an injunction, can in no wise alter the question of jurisdiction. The question of jurisdiction depends simply and solely on the facts constituting the basic cause of action. The lower Court held, and we think this decision proper beyond all question, that the plaintiff, as assignee of an equity of redemption, had no standing to prosecute this action because of the express inhibition of Section 24 of the Judicial Code. The determination of this question is unquestionably unaffected by the pres-

ence of an allegation and prayer for ancillary relief by way of injunction.

At this point we desire to call the attention of this Court to the fact that this case is substantially the same as the case of *Power and Irrigation Company of Clear Lake v. L. D. Stephens et al.,* No. 2501. In that case, the plaintiff's assignor borrowed money from the defendant Stephens with which to purchase land, and *had the vendor convey the land to Stephens* as security for the loan. That transaction constituted a mortgage equally with the transaction in the case at bar. The discussion in appellee's brief in that case as to the nature of the "chose in action"—as one arising from contract, not from tort, and therefore a "chose in action" within the meaning of the statute, is applicable here.

Argument on the Law.

I.

THE APPELLANT'S FIRST CONTENTION IS THAT THE LOWER COURT ERRED IN DECIDING THAT THE QUESTION OF JURISDICTION IS CONTROLLED BY SECTION 24 OF THE JUDICIAL CODE.

It will be remembered that the early Acts of 1789 and 1887-8 declared (for the purposes of this case) that an assignee who sought "to recover *the contents* of a chose in action" must show that his assignor could have maintained the action. The Judicial Code of 1912, however, declares that the

assignee must show that his assignor could have brought an action "to recover *upon* a chose in action".

The appellant, confronted by this pronounced change in an act which has long withstood adverse criticism, maintains that this change was obviously not intended to alter the meaning, and points to Section 294 of the Judicial Code which reads as follows:

> "Sec. 294. The provisions of this Act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest."

Appellees, in reply to this position, submit that the change in the language comes within the exception embodied in Section 294, to wit: "unless such change of intent shall be clearly manifest".

It should be remembered that the language employed in the Judiciary Act of 1789 and the Acts of 1887-8—"to recover the contents of a chose in action" has undergone the scrutiny of the Federal Courts for over a century. Despite this opportunity for judicial interpretation prescribing the precise limitations of this clause, the Courts have failed to entirely agree on such limitations.

In the case of *Shoecraft v. Bloxham,* 124 U. S. 730; 31 L. ed. 574, decided in 1888, in an opinion written by Justice Field, he had occasion to apply

the statute to an action to enforce the specific performance of a contract, Justice Field declared:

> "The terms used, 'the contents of any promissory note or other chose in action,' were designed to embrace the rights the instrument conferred which were capable of enforcement by suit. *They were not happily chosen to convey this meaning,* but they have received a construction substantially to that purport in repeated decisions of this Court."

We have italicized a portion of this extract to show the Court's dissatisfaction over the awkwardness of the language employed to declare the obvious meaning of the statute. We have here an opinion which *anticipates* and *calls for* the language now found in the Judicial Code of 1912. The scope of the acts preceding that of 1912, as distinguished from the scope of the present act, cannot be better expressed than by employing the language used by the lower Court in its opinion in the companion case of *Power and Irrigation Company of Clear Lake v. Bank of Woodland et al.,* No. 2499 (Tr. p. 35) where he says:

> "It must be remembered that we are not dealing with the words 'contents of a chose in action,' *which would imply a subsisting contract having the contents capable of recovery.*"

In other words this act as modified, is knowingly designed and intended to give the term "chose in action" a wider and more comprehensive scope than it has hitherto enjoyed, to form a basis for harmonizing the conflicting decisions, if any there be, con-

struing the preceding acts, and with the single limitation that the chose in action must not arise out of a tort, to embrace all choses or rights of action, founded on, depending upon or arising out of contract.

Appellant further advances the proposition that the lower Court, in determining the question of jurisdiction in this case, must apply the act in force prior to 1912. Appellant reasons that as the Land Company mortgaged its land to the Ditch Company prior to 1912, the cause of action to redeem accrued at that time, and that Section 299 of the Judicial Code preserves to plaintiff, *who acquired no rights until the assignment by the Land Company in 1913,* the right to be governed by the former act. When we consider that what we are to determine is the *right of the plaintiff in this action to maintain this action,* and consider that the plaintiff *did not become a party to this action by assignment* until after the Judicial Act of 1912 went into effect, it is perfectly clear that the question of jurisdiction is controlled by Section 24 of the Judicial Code alone.

II.

THE APPELLANT NEXT MAINTAINS THAT THE SUIT IS FOUNDED UPON THE TITLE TO REAL PROPERTY AND NOT UPON A CHOSE IN ACTION.

The appellant, as was its course in the companion case, *Power and Irrigation Co. of Clear*

Lake v. Stephens et al., No. 2501, again seeks refuge under the language of its complaint describing the transaction by which the Land Company invested it with the right to institute this action. The complaint reads:

> "That by mesne conveyances from said board of trustees, all of the title to said real property hereinabove described become and is now vested in the plaintiff, and plaintiff is the lawful owner thereof as successor in interest of said Central Counties Land Company." (Tr. p. 20.)

In short appellant maintains that this action is founded *on a conveyance of a title to land* and as such is not a suit to "recover upon a chose in action". Appellant maintains that the Land Company conveyed to it the title to the land, that it is suing the Ditch Company, appellee herein, to protect that title, that its rights arise from that title and that its rights are not based on any contract with the Ditch Company. In other words, appellant maintains that the Ditch Company did not obtain the land from the Land Company by way of a *contract* of mortgage, that the Land Company did not convey the legal title to the Ditch Company by deed absolute under the *express contract* that it was simply to be held by the Ditch Company as security for the latter's loan; but that the Ditch Company by a *tortious taking* obtained the land, that the Land Company conveyed the land to appellant and that the appellant is now suing the Ditch Company to recover the possession of said land in an action sounding in tort, not in contract.

Appellant relies on the cases of *Deshler v. Dodge,* 16 How. 631; 14 L. ed. 1084, and *Smith v. Kernochan,* 7 How. 216; 12 L. ed. 198.

In *Deshler v. Dodge,* supra, we have this language:

> "The principle governing the case will be found in cases that have frequently been before us arising out of the assignment of mortgages, *where it has been held, if the suit is brought to recover the possession of the mortgaged premises, the assignee may bring the suit in the federal courts, if a citizen of a State other than that of the tenant in possession, whether the mortgagee could have maintained it or not,* within this section; but, if brought to enforce the payment or collection of the debt by sale of the premises or by a decree against the mortgagor, then the assignee is disabled, unless the like suit could have been maintained by the mortgage. 7 How. 198."

Turning to the case of *Smith v. Kernochan,* supra, the authority on which the above statement is made, we find that it affords absolutely no foundation for the italicized portion of said statement. In *Smith v. Kernochan* a mortgagee had assigned his right to foreclose, or more properly speaking, had conveyed to a grantee his legal title, for the case arose in a jurisdiction where the mortgagee took legal title. The assignee or grantee sued the mortgagor in ejectment (the mortgage having previously been declared void in an action brought by the mortgagee himself).

The right of the assignee or grantee to maintain the action was not raised by *plea in abatement* and

on this ground, and on this ground alone, was the assignee or grantee allowed to proceed. The Court said:

> "The true and only ground of objection in all these cases is, that the assignor, or grantor, as the case may be, is the real party in the suit, and the plaintiff on the record but nominal and colorable, his name being used merely for the purpose of jurisdiction. The suit is then in fact a controversy between the former and the defendants *notwithstanding the conveyance;* and if both parties are citizens of the same State, jurisdiction of course cannot be upheld. (1 Peters 625; 2 Dallas 381; 4 lb. 330; 1 Wash. C. C. 70, 80; 2 Sumner 251.)
>
> "Assuming, therefore, everything imputed to the assignment of the mortgage from the company to the plaintiff, the charge of the court was correct. *The objection came too late, after the general issue. For when taken to the jurisdiction on the ground of citizenship, it must be taken by a plea in abatement, and cannot be raised in the trial on the merits.* (D. Wolf v. Rabaud, 1 Peters 417; Evans v. Gee, 11 id. 80; Sims v. Hundley, 6 How. 1)."

The Court acknowledged that had the objection to jurisdiction been properly raised, the assignee would not have been allowed to proceed.

Let us apply this decision to the appellant's reasoning that it is not barred from maintaining this action because it is a grantee of real property, not an assignee of a chose in action. In the very case of *Smith v. Kernochan,* supra, cited by appellant itself, the Court holds that in a jurisdiction *where the mortgagee takes legal title to the property,* the assignee or grantee of such mortgagee cannot main-

tain an action unless the mortgagee could maintain it. It follows that even if we concede the appellant's point, that it is a grantee of the title to land, not an assignee of a chose in action, we have at least one case which denies appellant the right to maintain this action under its own theory. At all events, *in cases where the plaintiff seeks to enforce rights under a contract of mortgage,* whether he be regarded as an assignee or a grantee, he must first show that his assignor or grantor could have maintained the action. It therefore becomes unnecessary for appellees to discuss the cases referred to on pages 11 to 14 of appellant's brief which concern the rights of grantees *in cases other than mortgage.*

III.

APPELLANT IS NOT BRINGING THIS ACTION AS THE GRANTEE OF TITLE TO REAL PROPERTY: BUT IS BRINGING THE ACTION AS ASSIGNEE OF A CHOSE IN ACTION, TO REDEEM REAL PROPERTY FROM A MORTGAGEE.

Despite the legal refinements which surround the mortgagor and mortgagee, in the last analysis, it is impossible to escape the conclusion that their rights and duties toward one another arise out of contract.

The appellant devotes pages 15 to 20 of its brief to a discussion of the theory and nature of a mortgage under the California system. Appellant contends with much force that the learned Court below misconceived the nature of this action. To take up and analyze in turn the California cases referred to,

defining the status of parties to a mortgage would needlessly encumber this brief. Let us rather admit the propositions appellant advances, to wit: that every transfer of an interest in property, made only as security, is to be deemed a mortgage; that this principle applies no matter how absolute the form of the deed; that the policy of the law is such that it will not permit the parties to contract that any title shall pass by the instrument. And having admitted these propositions, have we escaped the undeniable proposition that in the last analysis the rights of the parties are founded on *contract?*

The conclusion to which we are irretrievably led cannot be stated with more clarity, nor with more verity, than by adopting the language employed by the learned judge of the District Court in his opinion in this case. He declares:

> "However the action may be denominated, it seems quite clear to me that *what is sought here is the enforcement of the original contract* between the Central Counties Land Company and the Capay Ditch Company, and the rights asserted are based wholly thereon.
>
> The Court is asked to decalre the instrument in the form of deed to be a mortgage, and to do this because the parties agreed that it was such. *If it were not for this agreement, plaintiff would have no cause of action against defendants.* This agreement is a chose in action, and this suit being to recover upon it, falls within the terms of section 24, above quoted, and cannot be maintained."

In the last analysis then, the appellant is seeking to recover upon a chose in action based on a con-

tract, seeking to redeem land held by the Ditch Company under a mortgage, *seeking specific performance of the mortgagee's contract to reconvey the land on repayment of the loan.*

The cases holding that an assignee of one having the right to compel specific performance of a contract to convey land cannot maintain an action in the Federal Courts unless his assignor could have done so, are legion.

The language in the case of *Corbin v. Black Hawk County,* 105 U. S. 659; 26 L. ed. 1136, is very illuminating:

> "There can be no doubt that the original contracts in this case are choses in action, in respect to the rights acquired thereunder by the parties thereby contracting to purchase the lands in question. It is equally clear that by the instruments executed to the plaintiff by such purchasers, selling and conveying to him their several interests in the several tracts of land and assigning to him all their rights under said several contracts, he became the assignee of the contracts, as choses in action, in respect to the rights of the assignors thereunder, including their rights of action thereon which are sought to be enforced in this suit. The only question for consideration is, whether the suit is one to recover the contents of the contracts.
> * * *
>
> *The suit is really one for the specific performance of the contracts, to enforce them, to realize the fruits of the rights secured by them to the purchasers, and to reinstate the plaintiff in the position which he is entitled to occupy under the contracts as assignee thereof,* notwithstanding any acts done by the county or

its officers in impairment of the rights acquired by the contracts. Such a suit must be regarded as one to recover the contents of the contracts. The contents of a contract, as a chose in action, in the sense of section 629, are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations, is a suit to recover such contents. The promise to pay money, contained in a promissory note, is all that there is of the note. A suit to enforce the payment of the money is a suit to recover the contents of the note, because there is nothing contained in the note but the promise. The promise to receive the money, stipulated in these contracts to be paid by the purchasers as a foundation for their right to receive patents, is, so far as this suit is concerned, the essence of the contracts; and a suit to compel the acceptance of that money is a suit to enforce such promise and, therefore, is a suit to recover the contents of the contracts. * * *

Following out this principle, *the obligation or the promise contained in a contract is its contents,* when a suit is brought to enforce such obligation; and it does no violence to language to say that the suit is one to recover such contents."

The case of *Shoecraft v. Bloxham,* 124 U. S. 730; 31 L. ed. 574, merits our close attention. In this case a railroad held certain contracts for the conveyance of land. This railroad issued certain bonds to the plaintiff and as security gave a trust deed or mortgage covering "any right, title and interest which it had or might thereafter acquire in and to the lands granted or agreed to be

granted", under the terms of the aforesaid contract. In other words, the railroad had an equitable title to land, which it mortgaged to plaintiff. The plaintiff brought this action to foreclose the mortgage and compel the specific performance of the contract to convey the land. The Court held that plaintiff could not maintain the action because subject to the same disability as the railroad. The Court says:

> "The object of the suit is to perfect the title to the lands mortgaged by enforcing the performance of the contract. The deed of trust sets out in full the contract, and conveys all the right, title and interest which the railroad company had or might thereafter acquire in and to the lands granted by the trustees by their contract of May 31, 1871. *This conveyance of all right, title and interest 'in and to' the lands granted, or agreed to be granted, by the contract of sale, carried with it to the complainant an interest in the contract so far as such lands were concerned, that is, the right to perfect the title to the lands by enforcement of the contract. It was in legal effect the assignment of the contract itself.* If he cannot enforce that contract and thus secure the title to the company, the deed of trust, so far as the lands covered by the contract are concerned, is worthless as a security. If he has no interest in the contract he has no standing in court to ask its enforcement; and if he is to be regarded as an assignee of the contract under the deed of trust, he is disabled from maintaining the suit in the circuit court, by Section 629 of the Revised Statutes. He is subject to the same disability in that respect as his assignor."

IV.

FINALLY, APPELLANT MAINTAINS THAT THIS IS AN ACTION TO REMOVE A CLOUD FROM TITLE, NOT TO RECOVER ON A CHOSE IN ACTION.

The theory of appellant, we take it, is this: The notes given by the Land Company to the Ditch Company are outlawed, and under Section 2911 of the Civil Code, the lien of the mortgage is extinguished. The California cases referred to in pages 21 and 22 of appellant's brief, hold that the remedy of the mortgagor, or his assignee, to redeem the property becomes one *to quiet title, on paying the mortgage debt.* Again we find ourselves confronted with code provisions and decisions defining the rights and liabilities of mortgagor and mortgagee. But though the mortgagor or his assignee seeks to quiet title, it is still encumbent on him to repay the mortgage debt as a condition precedent to such relief. And why? Because he is a party to a contract and has assumed this obligation as a part of such contract. We cannot get away from Section 2920 of the Civil Code which defines mortgage as

> "*a contract* by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession".

In conclusion, we submit that plaintiff, appellant here, is seeking to redeem land from a mortgage, that appellant is an assignee suing "to recover upon a chose in action"—namely, to enforce specific performance of a contract of mortgage, and as

appellant's assignor could not maintain the action, it is under a like disability.

For each and all of the foregoing reasons, we submit that the decree dismissing the bill for want of jurisdiction was eminently proper, and should be sustained.

Dated, San Francisco,
March 10, 1915.

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